BEST AVAILABLE COPY

(9)

Supreme Court, U.S.
FILED
MAR 31 2006
OFFICE OF THE CLERK

No. 05-200

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
d/b/a EMPIRE BLUE CROSS BLUE SHIELD,

Petitioner,

v.

DENISE FINN McVEIGH, as administratrix of the
Estate of JOSEPH E. McVEIGH,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE JULIA CRUZ, AS REPRESENTATIVE OF JOSE S. CRUZ, IN SUPPORT OF RESPONDENT

CLINTON A. KRISLOV
Counsel of Record
MICHAEL R. KARNUTH
KRISLOV & ASSOCIATES, LTD.
20 NORTH WACKER DRIVE
SUITE 1350
CHICAGO, ILLINOIS 60606
(312) 606-0500

Attorneys for Amicus Curiae

200439

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should expand the Federal Employees Health Benefits Act's jurisdictional provision, 5 U.S.C. § 8912, to include reimbursement claims brought by private insurers against insureds arising under the terms of private contracts issued to federal employees, where the dispute arises from a tort recovery obtained by the insured in state court, where the contract terms at issue do not involve health coverage or benefits, where there is no demonstrated conflict between federal and state law on the issue, and where resolution of the claim does not substantially turn on interpretation of federal law.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	
Interest of Amicus Curiae	1
Statement of the Case	1
Summary of Argument	3
Argument	5
I. Congress Did Not Intend Reimbursement Claims Between Private Parties To Be Litigated In Federal Court	6
A. FEHBA's Jurisdictional Provision, Granting Federal Court Jurisdiction To Claims Against the United States, Should Not Be Judicially Expanded	6
B. Congress Did Not Intend FEHBA's Preemption Provision To Cover Insurer Reimbursement Claims Against Enrollees.	10
1. FEHBA's Statutory Scheme Shows That "Benefits", As Described Under FEHBA, Do Not Include Reimbursements Against Third-Party Recoveries	12

Contents

Page

2. FEHBA's Legislative History Further Shows That Congress Did Not Intend To Preempt Areas Involving Reimbursement 13

C. Federal Common Law Should Not Be Created To Resolve A Contract Dispute Between Private Parties 19

1. No "Unique Federal Interest" Exists 19

2. No Significant Actual State Law Conflict Exists 24

II. Petitioner's And The Government's Alternative Argument For Federal Jurisdiction Is Unavailing 25

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

CASES

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 15

Atherton v. F.D.I.C., 519 U.S. 213 (1997) 24

Botsford v. Blue Cross & Blue Shield of Mont., 314 F.3d 390 (9th Cir. 2002) 8

Boyle v. United Tech. Corp., 487 U.S. 500 (1987) ... 19, 22

Bragdon v. Abbott, 524 U.S. 624 (1998) 7

Bread Political Action Committee, et al. v. Federal Election Commission, 455 U.S. 577 (1982) 7

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) ... 5

City of Kenosha, Wisconsin et al. v. Bruno, 412 U.S. 507 (1973) 9

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 23

Clinton v. City of New York, 524 U.S. 417 (1998) .. 16

CSX Transportation v. Easterwood, 507 U.S. 658 (1993) 17

Doe v. Devine, 703 F.2d 1319 (D.C. Cir. 1983) 10, 22

Cited Authorities

Page

Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136 (2d.Cir. 2005) ..... *passim*

Empire Healthchoice Assurance, Inc. v. McVeigh, 402 F.3d 107 (2d Cir. 2005) 1

Evanns v. AT&T Corp., 229 F.3d 837 (9th Cir. 2000) 16

Finley v. United States, 490 U.S. 545 (1989) 7, 8

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 18

Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal. et al., 463 U.S. 1 (1983) 5

Goepel v. Ntl. Postal Mail Handlers Union, 36 F.3d 306 (3d Cir. 1994) 9

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, – U.S. –, 125 S. Ct. 2363 (June 13, 2005) 25, 26

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922) 24

Great-West Life v. Knudson, 534 U.S. 204 (2002) .. 6, 18, 19

Gully v. First Nat. Bank in Meridian, 299 U.S. 109 (1936) 5

Cited Authorities

Page

Howard v. Group Hospital Svc., 739 F.2d 1508 (10th Cir. 1984) 9, 21

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994) 7

Lingle v. Magic Chef, Inc., 486 U.S. 399 (1988) ... 11

Mackey et al. v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) 17

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) 5, 26

Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 23

Mooney v. Blue Cross of Western Penn., 678 F. Supp. 565 (W.D. Pa. 1988) 9

Nevada v. Hicks, 533 U.S. 353 (2001) 21

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 16

O'Melveny & Myers v. F.D.I.C., 512 U.S. 79 (1994) 25

Pan American Petroleum Corp. v. Superior Ct. of Delaware, 366 U.S. 656 (1961) 17, 24

Ramirez v. Humana, Inc., 119 F. Supp. 2d 1307 (M.D. Fla. 2000) 9

Cited Authorities

Page

Sereboff v. Mid-Atlantic Medical Services, Inc., 126 S. Ct. 735 (Nov. 28, 2005) 19

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 25

Taflin v. Levitt, 493 U.S. 455 (1990) 21

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 19, 23, 24

United States v. Erika, 456 U.S. 201 (1982) 9, 21

United States v. New Mexico, 455 U.S. 720 (1982) 16

United States v. Sherwood, 312 U.S. 584 (1941) ... 9

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 9, 10

Woodward Gov Co., v. Curtiss-Wright Flight Sys., Inc., 164 F.3d 123 (2d Cir. 1999) 22

CONSTITUTION STATUTES AND REGULATIONS

U.S. Const. Art. III 5

5 U.S.C. §8901 1

5 U.S.C. §8902(m)(1) ..... *passim*

5 U.S.C. §8903 12

Cited Authorities

	Page
5 U.S.C. §8904	12
5 U.S.C. §8912	i, 6, 7
5 U.S.C. §8913	3
28 U.S.C. §1331	5
28 U.S.C. §1346(a)(2)	9
28 U.S.C. §1346(b)	7
29 U.S.C. §1144(a)	18
47 U.S.C. §251	10
47 U.S.C. §252(e)(6)	10
5 C.F.R. §890.107	8
LEGISLATIVE HISTORY	
H.R. Rep. No. 105-374	15
H.R. Rep. No. 95-282 (1977)	13, 14
S. Rep. No. 105-257	15

Page

OTHER AUTHORITIES

Federal Employee's Health Plans, *Premium Growth and OPM's Role in Negotiating Benefits*, December, 2002, www.gao.gov/new.items/d03236.pdf. 2, 20

Leishman, *Adding Insult to Injury: ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214 (2005) 20-21

INTEREST OF AMICUS CURIAE

The law firm of Krislov & Associates, Ltd. is counsel to Petitioner, Julia Cruz, as Representative of Jose S. Cruz, in the petition pending before this Court in *Cruz v. Blue Cross Blue Shield of Illinois et al.*, No. 04-1657. The Seventh Circuit's decision in the *Cruz* case created a circuit split with the Second Circuit's decision being reviewed here. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 402 F.3d 107, 110 (2d Cir. 2005) ("we note our disagreement with the conclusions reached in [*Cruz*], which the Seventh Circuit decided ten days after we issued our original decision"). Cruz and her counsel thus have a direct and substantial interest in the outcome of this case.

Record counsel for both Petitioner and Respondent have consented to the request of the Krislov firm, on behalf of Mrs. Cruz, to file an Amicus brief. This brief is filed in support of Respondent to assist in explaining why Petitioner's and the Government's arguments cannot be squared with congressional intent, this Court's jurisprudence, or federalism concerns. The Krislov firm, as *amicus curiae*, asks the Court to hold that Blue Cross's reimbursement claim does not arise under federal law and affirm the Second Circuit's decision holding that no federal subject matter jurisdiction exists over that claim.[1]

STATEMENT OF THE CASE

In this case, as in many others, a beneficiary of a federal government-sponsored medical plan, covered by the Federal Employees Health Benefits Act of 1959 ("FEHBA"), 5 U.S.C. §8901 *et seq.*, was injured in an accident. The FEHBA Plan, administered here by Empire HealthChoice Assurance, Inc., d/b/a Empire Blue Cross Blue Shield ("Petitioner" or "Blue

---

1. No counsel for any party authored any portion of this brief. No party other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Cross"), paid his medical expenses.[2] The beneficiary filed and pursued a state-court tort action against tortfeasors to recover damages. Neither the FEHBA Plan nor its representatives assisted or participated in the state-court action. Instead, Petitioner initiated a second action, in federal court, invoking a reimbursement provision contained in the Statement of Benefits document prepared and issued by Blue Cross to beneficiaries, to demand payment from the injured beneficiary of the amount the Plan had expended for his medical care.

The nature of reimbursement claims, such as Blue Cross's here, is that they attach to third-party recoveries obtained through the efforts and expense of others, such as Respondent. The tortfeasor's money, not Blue Cross's or the Government's, is at issue. Had Respondent not pursued the third-party tort action, Blue Cross would have been unable to assert its reimbursement right and would, instead, have had to resort to either its subrogation right (requiring Blue Cross to expend its own effort and expense for recovery) or forgo any recovery. Additionally, Blue Cross's reimbursement claim by definition must arise long after an insureds' coverage and benefit determinations have been resolved and benefit payments made. Notably, a substantial source of those benefit plan payments (at least 25% of all premium dollars) are derived from the insured. Thus, the reimbursement claim is, in part, recovering funds that originated from the insured.

Blue Cross rejected offers to resolve its reimbursement claim in Respondent's state court litigation, instead opting to file the case below. The district court granted Respondent's motion to dismiss, holding that federal subject matter

2. According to a December 2002 report by the United States General Accounting Office, approximately 8.3 million individuals were covered by FEHBA-governed health plans. Federal Employee's Health Plans, *Premium Growth and OPM's Role in Negotiating Benefits*, December 2002, *www.gao.gov/new.items/d03236.pdf*, p.1 (visited March 30, 2006) (the "GAO's December 2002 FEHBA Premium Growth Report").

jurisdiction does not exist over Blue Cross's reimbursement claim. The Second Circuit affirmed and denied Blue Cross's motions for rehearing and *en banc* review.

SUMMARY OF ARGUMENT

Blue Cross has been the Government's sole insurance carrier under the Service Benefit Plan since FEHBA's inception in 1959. Over the past forty years there have been numerous reimbursement claims asserted by Blue Cross and addressed, adjudicated, and resolved by state courts. Despite that long history, Blue Cross and the Government fail to present to this Court any evidence supporting their contention that state adjudication of these claims adversely affects the federal treasury, that state law significantly conflicts with these claims, that state courts, who are experienced and capable of resolving contract disputes and reimbursement claims, cannot adequately protect Blue Cross's interests, or that Congress has any concern about this issue.

Blue Cross and the Government do not contend that the FEHBA statute addresses reimbursement. Indeed, they do not even point to a stray remark about reimbursement anywhere in FEHBA's legislative history. Nor do they contest that the Office of Personnel Management ("OPM"), which is authorized to "prescribe regulations necessary to carry out [FEHBA]", 5 U.S.C. § 8913, has not issued regulations addressing reimbursement. Blue Cross fails to support its position with any explicit showing within FEHBA or its legislative history (except for a tortured interpretation of FEHBA's preemption provision) that Congress intended federal courts to adjudicate reimbursement claims.

Blue Cross supports its argument for federal subject matter jurisdiction with only general assertions that uniformity is needed in applying plan terms and that the federal treasury is affected. Blue Cross ignores, however, that the reimbursement terms it relies on are contained in the Statement of Benefits, a document Blue Cross prepared and issued to insureds, and not

in the contract between it and OPM. The Blue Cross/OPM contract only addresses subrogation rights, not reimbursement, and, notwithstanding, both concepts are outside Congress's explicit jurisdictional scope for FEHBA. And with respect to reimbursement matters, Blue Cross, not OPM, authors the terms and directs how to proceed.[3]

Allowing federal jurisdiction here would unnecessarily burden federal employees and the courts with duplicitous litigation, requiring state and federal courts to resolve different parts of the same case. State courts are well-qualified to handle contract issues and, given that the funds Blue Cross seeks to lien against are obtained in state court, the reimbursement question should be resolved there as well.

Petitioner and the Government offer no controlling authority that even resembles the record and issue we have here, where

3. Set forth in Cruz's pending certiorari petition is the Department of Justice's concession that Blue Cross has sole authority over reimbursement decisions:

> Medicare is a health insurance program maintained and underwritten by the Federal Government itself, in which carriers and fiscal intermediaries act as agents of the Government and perform functions that would otherwise be performed by the Government. In contrast, FEHBA carriers do not perform outsourced governmental tasks, are not agents of the Government, and do not act on behalf of OPM. Rather, they function as independent economic entities that offer and run their own health insurance plans, performing a role that is not governmental in nature but, instead, is akin to their activities as insurers in the private-sector marketplace. An extension of the principle in the cases cited by BCBS beyond the Medicare context to the FEHBA context would be unwarranted and would distort OPM's relationship with BCBS.

Cruz, No. 04-1657 (petition pending), at 6 (Excerpt from "Statement of Interest of the United States of America" at 19-20, filed July 30, 2004, in *Doyle, Cruz et al. v. Blue Cross Blue Shield of Illinois*, No. 00 CH 14182 (Cir. Ct. of Cook County, Illinois, Chancery Div.) (Judge Peter Flynn, presiding)).

the Court found subject matter jurisdiction exists. Finding jurisdiction on the issue raised here would significantly loosen the federal question jurisdictional standards and call into question this Court's jurisprudence.

ARGUMENT

Absent diversity jurisdiction, a federal court's power to hear cases is limited to those "arising under" the Constitution, Federal law, or treaties. U.S. Const. Art. III, § 2; 28 U.S.C. § 1331. The term "arising under" has been clarified in the development of the "well-pleaded complaint rule," which limits the types of cases that arise under the federal Constitution and laws of the United States. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal. et al.*, 463 U.S. 1, 9-10 (1983). This rule provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

In order to avoid being strictly bound by the language of the complaint, courts have relied on the "artful pleading doctrine" to look beyond a plaintiff's characterization of a claim to determine whether the claim truly arises under federal law. This doctrine is applicable where, as here, the plaintiff purports to assert a federal claim where none exists. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807-8 (1986) (remanding case to state court for lack of federal question jurisdiction even though complaint asserted allegations under federal law); *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 114 (1936) ("A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.").

Petitioner argues that federal question jurisdiction exists over its reimbursement claim under FEHBA, the contracts and regulations established pursuant to FEHBA, and federal common law. Pet. Br. 14. For the reasons set forth herein, Blue Cross's "artfully pled" complaint fails to (and indeed cannot) plead a valid federal claim and, thus, federal question jurisdiction does not exist.

I. CONGRESS DID NOT INTEND REIMBURSEMENT CLAIMS BETWEEN PRIVATE PARTIES TO BE LITIGATED IN FEDERAL COURT

A plain reading of the entire FEHBA statute and its legislative history, coupled with the statute's purpose to protect federal employees against increased costs, strongly suggests that Congress did not intend for state court litigants to be forced into federal court to resolve reimbursement claims.

A. FEHBA's Jurisdictional Provision, Granting Federal Court Jurisdiction To Claims Against the United States, Should Not Be Judicially Expanded

Where a federal statute expresses the parameters of district court jurisdiction, that expression is "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life v. Knudson*, 534 U.S. 204, 209 (2002) (emphasis in original) (*citing*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)).

A plain reading of FEHBA's jurisdictional provision clearly shows that FEHBA does not create a private right of action for a health insurer to sue its members in federal court. That provision states that district courts have jurisdiction over "a civil action or claim *against the United States* founded on this chapter." 5 U.S.C. §8912. (Emphasis supplied).

Petitioner and the Government argue that FEHBA's jurisdictional provision does not bar the kind of claims Petitioner brought or the parties that Petitioner sued in this case. (Pet. Br. 29-30 fn2; Govt. Br. 27fn5). However, had Congress intended

federal courts to have jurisdiction over all civil actions arising under FEHBA, it could have easily provided for exclusive jurisdiction of all claims arising under that legislation (as it did when enacting, among others, ERISA legislation), rather than limiting jurisdiction solely to claims against the United States. *See, Bread Political Action Committee, et al. v. Federal Election Commission*, 455 U.S. 577, 580 (1982) ("Jurisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes'"). Expanding jurisdiction to include disputes between parties violates this Court's instruction to not expand federal court powers "by judicial decree". *Kokkonen v.Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Finley v. United States*, 490 U.S. 545, 547 (1989) ("courts which are created by law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.").

Petitioner's and the Government's expansive interpretation of FEHBA conflicts with an analogous situation addressed by this Court in *Finley*. In *Finley*, a widow sought to amend her federal action against the United States, brought under the Federal Tort Claims Act ("FTCA"), to add state law claims against non-federal parties. 490 U.S. at 546-47. In declining jurisdiction over non-federal parties, this Court held that the text of the FTCA, which provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States", 28 U.S.C. §1346(b), "means against the United States and no one else." *Id.* at 552.

The text of the FTCA's and FEHBA's jurisdictional provisions are substantially the same, *cf.*, 28 U.S.C. 1346(b), *with* 5 U.S.C. 8912, and, thus, should be similarly applied. *See, Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."). To allow Blue Cross to sue a plan member in federal court under FEHBA would

require an extremely liberal interpretation of FEHBA's jurisdictional provision which Congress clearly did not intend. *See*, *Finley*, 490 U.S. at 552 (indicating that if Congress wanted to, it could have easily worded the statute to broaden its reach beyond only actions against the United States).

Moreover, limiting federal jurisdiction to claims against the United States comports with other FEHBA provisions, its legislative history, and OPM's regulations. Indeed, actions against the United States encompass enrollee claims against OPM for coverage and benefit denials, and benefit cost disputes. These sort of claims are addressed in FEHBA's preemption provision, 5 U.S.C. §8902(m)(1) (allowing "provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits . . . [to] preempt any State or local law . . . which relates to health insurance or plans"), and the meaning of the coverage and benefit terms can be gleaned throughout the FEHBA statute and its legislative history. Those sources show that Congress's interest in this area was limited to medical care issues, such as the type of procedures covered and the cost of those benefits. Furthermore, the FEHBA regulation requiring that "denial of health benefits must be brought against OPM and not against the carrier or carrier's subcontractors, 5 C.F.R. §890.107, further supports the federal jurisdiction limitation argued by Respondent, to only suits by beneficiaries against OPM. *See*, *McVeigh*, 396 F.3d at 145 fn7 (holding that the OPM's lack of regulations "to open the federal courts to insurance carriers seeking reimbursement from beneficiaries" signifies what Congress did not intend).[4]

4. Numerous courts agree with the Second Circuit's literal, narrow interpretation of FEHBA's jurisdictional provision. *See*, *McVeigh*, 396 F.3d 136, 145 (2d Cir. 2005) ("§8912 does demonstrate that Congress considered jurisdictional issues in enacting FEHBA and did not hesitate expressly to confer federal jurisdiction where it found it necessary to do so."); *Botsford v. Blue Cross & Blue Shield of Mont.*, 314 F.3d 390, 398-99 (9th Cir. 2002) ("FEHBA provides federal courts with jurisdiction solely over suits against the United States", further stating: "we conclude

(Cont'd)

In contrast, expanding federal jurisdiction beyond claims against the United States would violate Congressional intent and "overload[] the [federal] courts" with matters that are and can be easily addressed by state courts. *See, United States v. Erika*, 456 U.S. 201, 209-10 (1982) (strictly construing medicare statute and its legislative history which precluded federal question jurisdiction over Medicare part B claims). Without any, let alone clear, Congressional intent that insurer reimbursement claims were meant to be resolved in federal court, this Court must refrain from judicially expanding FEHBA's jurisdictional provision. *Id.*; *see also, United States v. Sherwood*, 312 U.S. 584 (1941) (holding that suits under the Tucker Act, 28 U.S.C. 1346(a)(2), can only be brought in federal court and only against the United States); *City of Kenosha, Wisconsin et al. v. Bruno*, 412 U.S. 507, 513 (1973) (holding no federal jurisdiction existed over civil rights action against municipalities because the Court found that "the legislative history" and "the language actually used by Congress" did not "bring municipal corporations within the ambit of s1983.").[5]

(Cont'd)
that Congress intended to limit suits over benefits under a FEHBA plan to only one defendant: United States."); *Goepel v. Ntl. Postal Mail Handlers Union*, 36 F.3d 306, 307 (3d Cir. 1994) (remanding insured's suit against insurer because, among other reasons, "the United States is not a party to this action."); *Howard v. Group Hospital Svc.*, 739 F.2d 1508, 1511 (10th Cir. 1984) (holding that district court lacked federal jurisdiction on claims brought by FEHBA plan insured against insurer because "the United States here acts as the agent, not the insurer of health benefits."); *Ramirez v. Humana, Inc.*, 119 F. Supp. 2d 1307, 1312 (M.D. Fla. 2000) (acknowledging jurisdiction under FEHBA is limited to suits against the United States); *Mooney v. Blue Cross of Western Penn.*, 678 F. Supp. 565, 566 (W.D. Pa. 1988) ("[i]f Congress had intended . . . district courts to have jurisdiction over private actions by [FEHBA] plan participants against plan providers, we believe it would have explicitly stated so.").

5. The Petitioner's reliance on *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), is misplaced.
(Cont'd)

B. Congress Did Not Intend FEHBA's Preemption Provision To Cover Insurer Reimbursement Claims Against Enrollees.

Petitioner and the Government ignore FEHBA's express preemption limitations in arguing that this provision supports federal jurisdiction over Blue Cross's reimbursement claim. FEHBA's preemption provision states, in relevant part:

> The terms of any [FEHBA] contract . . . which relate to the nature, provision or extent of coverage or benefits (including payments with respect to benefits) shall supercede and preempt any State or local law . . . which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

Petitioner and the Government make several errors in contending that FEHBA's preemption provision covers this dispute. First, Blue Cross filed suit against McVeigh in federal court based upon reimbursement language contained in the Statement of Benefits that Blue Cross prepared and issued to FEHBA plan enrollees. That reimbursement provision was not mandated by OPM, which merely authorizes the distribution of that document. *See*, *Cruz* petition (pending) at 6 (identifying the Government's concession that Blue Cross operates independently); *Doe v. Devine*, 703 F.2d 1319, 1333 fn62 (D.C. Cir. 1983) (J. Ginsburg) ("OPM can negotiate, but cannot 'impose', contract terms."). No express terms of the OPM/Blue Cross contract, a separate document from the Statement of

---

(Cont'd)

(Pet. Br. 29-30 fn2). That decision did not address a jurisdictional provision or language even close to that contained in FEHBA. *Verizon* addressed the Telecommunications Act of 1996, 47 U.S.C. 251, *et seq.*,and, specifically, 47 U.S.C. 252(e)(6), which set forth "procedures for negotiation, arbitration, and approval of agreements". The Court unsurprisingly found that the provision's language did not "eliminate jurisdiction under §1331". *Id.* at 643.

Benefits, is at issue in this case. *See*, *Lingle v. Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) (declining to preempt state tort law under LMRA, where claim did not require interpretation of collective bargaining agreement).

Next, the reimbursement language on which Petitioner and the Government rely does not "relate[] to" "coverage or benefits (including payments with respect to benefits)". The Government distorts the plain meaning of "coverage or benefits" under FEHBA in defining a carrier's reimbursement lien as part of the "net benefits" an enrollee receives from the carrier. (Govt. Br. 19). This strained interpretation is made without any reference to the description of benefits set forth in FEHBA and its legislative history. This position stretches FEHBA's "relate to" clause further than Congress intended and distorts the meaning of "benefits" under FEHBA, and is based upon a tenuous, indirect connection between money paid by the plan (which were funded in large part by premiums paid by insureds) and a recovery received by Respondent from a third-party tortfeasor. Petitioner's and the Government's rationale – that a plan's reimbursement reduces the "benefit" provided to the insured – ignores the fact that carrier coverage and benefit determinations, and payments with respect to those, are completed long before reimbursements are asserted and recovered.

A plain reading of the FEHBA statute and its legislative history shows no direct connection exists linking "coverage or benefits" with Congressional intent to apply preemption here, and that no material link or relation should be implied.

1. *FEHBA's Statutory Scheme Shows That "Benefits", As Described Under FEHBA, Do Not Include Reimbursements Against Third-Party Recoveries*

Section 8903 of FEHBA identifies four types of health benefit plans that OPM may contract for or approve. 5 U.S.C. §8903. Plaintiff was a member of the Service Benefit Plan, which is described in subsection 8903(1). That subsection, like the other three, refer to FEHBA section 8904 to describe the "benefits" covered under each plan. Section 8904, titled "Types of benefits", states, in relevant part:

> (a) The benefits to be provided under plans described by section 8903 of this title may be of the following types:
>
> (1) Service Benefit Plan. —
>
> (A) Hospital benefits.
>
> (B) Surgical benefits.
>
> (C) In-hospital medical benefits.
>
> (D) Ambulatory patient benefits.
>
> (E) Supplemental benefits.
>
> (F) Obstetrical benefits.

It is clear that this FEHBA section, which provides guidance on Congress's intent regarding the scope of the word "benefits", does not encompass a private carrier's reimbursement claim against an insured.

2. *FEHBA's Legislative History Further Shows That Congress Did Not Intend To Preempt Areas Involving Reimbursement*

In 1977, eighteen years after its enactment, Congress amended FEHBA to add a preemption provision, § 8902(m)(1). This provision was intended, designed and drafted to be a very narrow, surgical response to a specific conflict which bothered federal officials. The problem involved some states attempting to require federal government health insurance plans to include certain types of coverage (specifically, treatment by chiropractors) which the federal plans did not then include. Thus, 5 U.S.C. § 8902(m)(1) was created to preempt state laws only to the extent that state laws attempted to force federal health plans to include benefits other than those chosen by the federal plan. *See, e.g.*, House Report No. 95-282 (1977), pp. 4-5:

> Some States have established health insurance requirements that conflict with the provisions of the FEHB contracts, such as requiring recognition of certain practitioners not covered by Federal employee's health benefits plans.
>
> * * *
>
> For example, the Indemnity Benefit Plan (Aetna) pays for chiropractic services in Nevada, as required by State law, but does not pay for such services in any other State. Six employee organization plans pay for chiropractic services only in New York and Montana where State law requires coverage for such services.
>
> * * *
>
> The effect of this amendment is to preempt application of State laws or regulations which specify types of medical care, providers of care, extent of benefits, coverage of family members, age limits for family members, or other matters relating to health benefits or coverage . . .

Petitioner's contention that Congress intended to preempt all state laws related to FEHBA plan contract terms is belied by statements made by the agency overseeing this statute. In a letter to Congress from the United States Civil Service Commission ("USCSC"), the predecessor of OPM, which was attached to House Report No. 95-282, the USCSC acknowledged the narrow scope of FEHBA's preemption:

> It is a form of limited preemption.
>
> * * *
>
> more and more States have legislated the kinds of benefits and medical practitioners that carriers doing business in these States must cover. These laws in effect presented serious problems from the standpoint of the uniformity of benefits under the program. It also placed carriers in serious jeopardy of loss of their license in a State unless they were to approve pay for a benefit not provided under our contract but required by State law.

Id. at 6.

In 1998, Congress amended FEHBA's preemption provision to broaden its reach over benefits and coverage issues by merely deleting the phrase "to the extent that such law or regulation is inconsistent with the provisions of the Federal employees' health benefits contract". 5 U.S.C. §8902(m)(1) (1997). Significantly, Congress, in amending the provision, did not delete the limiting phrase "coverage or benefits". The legislative history of this amendment, which was part of the passage of the Federal Employees Health Care Protection Act of 1997, further shows that the amended preemption provision still solely focused on preventing State laws addressing benefits and coverage issues that were surviving under the old provision.

> These changes would affect states that have requirements governing what types of organization can provide health care when those requirements are

> different from those under federal contracts. This preemption would be considered a mandate under UMRA. However, because the only effect of the preemption would be to limit the application of state law in some circumstances, CBO estimates that any costs to state or local governments arising from this mandate would be minimal.

S. Rep. No. 105-257, pt. V (1998).

Congress expressed its limited expansion of the statute to capture other pure benefit and coverage issues in its description of the amendment as "technical changes", *Id.* at pt. I, and in its statement that costs to state or local governments "would be minimal". *See also*, H.R. Rep. No. 105-374, pt. 2, at p. 8 (1998) ("For example, a carriers effort to establish a preferred provider organization (PPO) across the country would not be jeopardized by State-mandated 'any willing provider' statutes."). Nothing in the legislative history of FEHBA's preemption provision suggests that Congress was concerned with allowing state courts to adjudicate carrier reimbursement claims asserted against third-party tort recoveries. *See*, *McVeigh*, 396 F.3d at 149 (finding no indication from the statute's words or its legislative history "that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to" a plan's reimbursement lien) (*citing*, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (rejecting carrier's argument that Airline Deregulation Act barred state breach of contract claim)).[6]

6. Although it did not reach the issue, the Second Circuit's concern over the constitutionality of FEHBA's preemption provision is valid. *McVeigh*, 396 F.3d at 143 (questioning whether "contract terms" written by Blue Cross can "preempt state law because, as it believed, 'only federal law may preempt state and local law"). The Second Circuit reasoned that the "FEHBA-authorized contracts . . . are not" federal laws because "the government does not impose contract terms as it would impose a law. [r]ather, the OPM negotiates the contract terms

(Cont'd)

This review of the text and legislative history of FEHBA's preemption provision shows that Petitioner's and the Government's position violates this Court's standard for

(Cont'd)

privately with insurance providers . . . who are under no obligation to enter into the contracts in the first place." *Id.* at 144 (distinguishing contracts and tariffs by recognizing that a "tariff, required by law to be filed, is not a mere contract, [i]t is the law"; *citing, Evanns v. AT&T Corp.*, 229 F.3d 837, 840 fn 9 (9th Cir. 2000)). In refusing to reach the constitutional issue, the court narrowly construed the provision making it clear that its construction required that the federal law preempting state law may be federal common law or the FEHBA statute provisions themselves, but it must be law – not contract terms. *Id.* at 145.

This Court is certainly able to address the constitutional issue if it deems necessary, especially since the Government raised it in their brief (Govt. Br. 22-23). *See, New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 fn24 (1979) ("The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue."). Moreover, this Court's precedent support's the Second Circuit's concern. *See, Wolens*, 513 U.S. at 229 fn5 ("the word series 'law, rule, regulation, standard, or other provision,' . . . connotes official, government-imposed policies, not the terms of a private contract."); *Id.* at 241 (J. O'Connor, *concurring in the judgment in part and dissenting in part*) ("To be sure, the terms of private contracts are not 'laws,' any more than the guidelines at issue in *Morales* were 'laws.'"); *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998) (holding "Line Item Veto Act" unconstitutional, stating: "Something that might be known as 'Public Law 105-33 as modified by the President' may or may not be desirable, but it is surely not a document that may 'become a law' pursuant to the procedures designed by the Framers of Article I, §7, of the Constitution"); *United States v. New Mexico*, 455 U.S. 720, 737 (1982) (rejecting immunity shield for government contractor despite them having "modified their agreements two years into the litigation in an obvious attempt to strengthen the case for nonliability", further stating: "We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows any government functionary to draw the constitutional line by changing a few words in a contract.") (*internal quotes and citation omitted*).

applying preemption statutes. *See, CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993) (holding that courts should only preempt when it is the "clear and manifest purpose of Congress" to do so). Long before the preemption provision was added to FEHBA, state courts were well-versed in adjudicating subrogation and reimbursement claims. *See, Pan American Petroleum Corp. v. Superior Ct. of Delaware*, 366 U.S. 656, 663 (1961) (finding that claims for restitution are "traditional common-law [state] claims" that "do not lose their character because . . . of federal regulation"). Blue Cross and the Government do not offer any support for their argument that Congress intended to wrest away this traditional state court function.

Moreover, Petitioner and the Government fail to identify any specific state law "which relates to health insurance or plans" that conflicts with Blue Cross's right to reimbursement. New York does not have an anti-subrogation or anti-reimbursement law. Any law that Petitioner attempts to raise in reply or at oral argument would at best be a law of general application not specifically targeted to health insurance or plans. *See, Mackey et al. v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 846 (1988) (refusing to preempt "run-of-the-mill state law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan . . . [even though these suits] obviously affect[] and involv[e] ERISA plans and their trustees"); *McVeigh*, 396 F.3d at 146 fn10 (finding no state law conflict existed, further stating: "[i]f Congress had not wished to limit the types of state laws subject to preemption, it could have quite easily provided that 'federal law shall govern the interpretation and enforcement of contract terms'"). Thus, even if Congress intended FEHBA to preempt the reimbursement field, there still is no showing that Congress intended to preclude state courts from addressing those issues.

Finally, the Petitioner's and the Government's comparison to ERISA's preemption provision and this Court's interpretation of that provision is misplaced. FEHBA's provision, unlike

ERISA's, states that only plan terms that relate to "coverage or benefits" preempts state law. *Cf.* 5 U.S.C. 8912(m)(1) *with* 29 U.S.C. 1144(a). No such limitation is contained in ERISA and no coverage or benefit dispute is at issue in this case. *See*, *FMC Corp. v. Holliday*, 498 U.S. 52, 62, 64 (1990) (instructing courts to give life to "distinction[s]" in statutes where Congress is aware of those differences and "has chosen not to alter", further instructing courts to find meaning in the words Congress uses in "preemption clause[s]"). Moreover, as the Second Circuit found in declining to extend ERISA precedent, ERISA is "significantly more comprehensive than FEHBA, in that it contains multiple preemption provisions and a detailed civil enforcement scheme intended to completely supplant state law." *McVeigh*, 396 F.3d at 147-48 & fn13 ("reject[ing] . . . suggestion that we should rely on ERISA-related precedent to determine the preemptive reach of FEHBA" and recognizing FEHBA's limiting term not found in ERISA's preemption provisions, "which requires that the preempting contract term 'relate to . . . [health] coverage or benefits'"). Furthermore, this Court has already construed ERISA narrowly with respect to a plan's asserted reimbursement claim, as here, and held that such a claim does not arise under federal law. *See*, *Great West*, 534 U.S. at 221 fn5 (construing the phrase "appropriate equitable relief" to exclude a Plan's reimbursement claim and rejecting plan's argument that jurisdiction is warranted because it "is consistent with ERISA's purposes").[7] Petitioner offers no support for

7. The Government's reliance on *FMC Corp.*, is misplaced. In *FMC*, this Court addressed whether ERISA's broader preemption provision applied to prempt "Pennsylvania's anti-subrogaton law", which "[did] not merely have an impact on the insurance industry, it [was] aimed at it." 498 U.S. at 61. That state law prohibited benefit "plans from being structured in a manner requiring reimbursement in the event of recovery from a third-party." *Id.* Unlike in *FMC*, here the Government fails to point to *any* state law that prevents Blue Cross from asserting its reimbursement claim against Respondent, let alone any state law that is targeted at this plan's reimbursement provision.

extending FEHBA's much narrower preemption provision further than ERISA's reach.[8]

C. Federal Common Law Should Not Be Created To Resolve A Contract Dispute Between Private Parties

Judicial creation of federal common law is limited to those "narrow areas . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The standards for creating such laws were set forth by this Court in *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1987). Neither prong of *Boyle's* two-part test are met, however, to support creation of federal common law here. Blue Cross's reimbursement claim simply does not implicate a "uniquely federal interest", nor does it involve a "significant conflict" between an identifiable "federal policy or interest and the operation of state law". *Id.* at 504-07.

1. *No "Unique Federal Interest" Exists*

Petitioner's and the Government's contentions that the impact of reimbursement on the federal treasury creates a substantial, unique federal interest and that the federal policy of uniform health benefits for FEHBA plan enrollees is in conflict with state law (Pet. Br. 22; Govt. Br. 7, 25) are unsupported and erroneous. The United States General Accounting Office's ("GAO") December 2002 report, analyzing premium growth in FEHBA plans, undercuts Petitioner's position. In that report, the GAO indicates that most of the increases in FEHBA plan premiums were a result of higher

---

8. Amicus are aware that this Court is presently addressing whether the *Great West* decision left the federal door open to an ERISA plan asserting a limited type of reimbursement claim. *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 735 (Nov. 28, 2005) (*cert. granted*). Given the material differences in the language of the ERISA and FEHBA statutes, the outcome of that decision, even if the Plan prevails there, will not be dispositive here.

prescription drugs and hospital care expenses. GAO's December 2002 FEHBA Premium Growth Report, at 2, *www.gao.gov/new.items/d03236.pdf*, (visited March 30, 2006). Nowhere in the thirty-one page report and appendixes does it suggest that carrier reimbursements have had or will have a material affect on premiums. Indeed, reimbursements from third-party recoveries is not even mentioned in the report.

Moreover, Petitioner and the Government ignore the inherent nature of Blue Cross's claim. Petitioner's reimbursement claim does not involve any further "payments with respect to benefits" (as FEHBA's preemption provision addresses), but rather seeks reimbursement from a third-party recovery that Respondent, not Petitioner, pursued and obtained in a state court action.

Contrary to Petitioner's and the Government's suggestion, litigating reimbursement claims in federal court may have the opposite, adverse affect on the Federal Treasury. If injured insureds are required to litigate in two, rather than one legal forum (initiating the tort action in state court only to be later dragged into federal court to resolve the carrier's reimbursement claim), the costs of litigation would increase and would likely result in some litigants deciding against pursuing a third-party case. This chilling effect on certain tort actions will reduce Blue Cross's reimbursement recoveries and/or increase its costs in pursuing subrogation claims.[9] It would also result in flooding

9. It is undisputed that this case raises a reimbursement claim, not a subrogation claim. The distinction between subrogation and reimbursement should be noted if any importance is given to the subrogation provisions contained in OPM's contract with Blue Cross. That contract is silent on reimbursement, which is only contained in the Statement of Benefits authored and issued by Blue Cross.

Several important distinctions exist between the two concepts. Subrogation allows Blue Cross to step into the shoes of the injured party and assert its recovery rights directly against the tortfeasor. In a subrogation setting Blue Cross initiates the action and advances the effort and expense to secure a recovery. *See*, Leishman, Adding Insult

(Cont'd)

the federal courts and thereby increasing federal court expense with matters that can and should be adjudicated by state courts. *See, Erika, Inc.*, 456 U.S. at 209-10 (cautioning against unnecessarily burdening the federal court system); *see also, Nevada v. Hicks*, 533 U.S. 353, 366 (2001) ("It is certainly true that state courts of 'general jurisdiction' can adjudicate cases invoking federal statutes, such as §1983, absent congressional specification to the contrary. 'Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States'" (*citing, Taflin v. Levitt*, 493 U.S. 455, 458 (1990)).[10] Here,

---

(Cont'd)

to Injury: ERISA, Knudson, and the Error of the Possession Theory, 89 Minn. L. Rev. 1214, 1215-16 (2005). In contrast, with reimbursements, Blue Cross does nothing to secure the third-party recovery, which is pursued solely by the injured insured in state court (or by way of negotiated settlement). *Id.* Instead, Blue Cross asserts a contractual right to repayment from the insured's third-party recovery. *Id.* Thus, even if a plausible rationale exists, pursuant to the OPM/Blue Cross contract, to allow these subrogation matters to be heard in federal court, that same reasoning would not apply to reimbursement situations.

10. The Government's position in this case is curious since it is undercut by the contrary position it took in *Howard v. Group Hospital Service*, 739 F.2d 1508 (10th Cir. 1984), where the court addressed an insured's tort and breach of contract action arising from an insurer's failure to pay claims under a FEHBA plan. There the Tenth Circuit concluded that the insureds claims "would have no direct effect upon the United States or its Treasury" because "[t]he Solicitor General, waiving his right to respond in these cases, advised us:

> In the course of the proceedings below, the United States determined that its interests would not be directly affected by the resolution of these issue[s] and therefore did not participate in briefing or argument in the court of appeals. In view of these considerations, the United States does not intend to respond to the petitions unless it is requested to do so by the Court.

Id. at 1510.

nothing in FEHBA suggests that Congress intended to bar state courts from hearing these matters, even if a federal interest is involved.

The Government's suggestion that the federal courts would not be burdened with factual disputes with respect to reimbursement matters (Govt. Br. 30) is belied by ample evidence to the contrary. According to a 1993 article in the New York Times, the "General Accounting Office has estimated that 99 percent of hospital bills contain overcharges". Elisabeth Rosenthal, *Confusion and Error Are Rife In Hospital Billing Practices*, N.Y. Times, January 27, 1993. A recent Chicago Tribune article confirmed similar results. Lorene Yue, "*Examine hospital bills for mistakes that can ail you*", Chicago Trib. Online Ed., February 20, 2005 ("Medical claims advocates estimate that 8 of 10 bills contain some kind of mistake, ranging from data-entry errors and duplicate charges to failure to provide group discounts for related services"). Resolving these and other factual disputes should be given to the state courts who would already be intimately familiar with the underlying case and Blue Cross's claim.

Additionally, Petitioner's and the Government's "vague assertions about the need for uniformity" and "generalized pleas for uniformity" are insufficient to support a federal interest. *See*, *Woodward Gov Co., v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 129 (2d Cir. 1999) (*citing*, *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979)). Petitioner's claim against McVeigh is based upon the alleged breach of the terms of the Statement of Benefits, a document written and issued by Blue Cross, and does not involve any terms contained in the OPM/Blue Cross contract. Unlike in *Boyle*, neither the OPM or the Government mandates the language contained in the Statement of Benefits issued by Blue Cross to insureds. *See*, *Boyle*, 487 U.S. at 507 (finding that a uniquely federal interest is established where the "terms of Government contracts . . . specified by the Government" are affected); *cf. Devine*, 703 F.2d at 1333 fn62 ("OPM can negotiate, but cannot 'impose,' contract terms.");

see also, *Cruz*, No. 04-1657 (petition pending) at 6 (conceding that Blue Cross "function[s] as [an] independent economic entit[y]").

In *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977), a plaintiff brought a third-party beneficiary claim pursuant to a contract between a County and the Federal Aviation Administration ("FAA") that was federally authorized by the Airport and Airway Development Act of 1970. The contract required the County to restrict the area around the airport to only those activities suitable for airport operations. *Id.* at 27. Plaintiff asserted that the County breached the contract by allowing a garbage dump adjacent to the airport which attracted birds and caused a plane crash. *Id.* Despite the contract being authorized by federal law and the Court acknowledging that "the operation of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude (similar to the arguments by Petitioner), the Court denied federal jurisdiction because it found no clear Congressional mandate to displace state law in these types of cases where private parties are involved. *Id.* at 32. Furthermore, as Blue Cross fails to establish here, the *Miree* Court also found "no direct effect upon the Federal Treasury". *Id.* at 29.[11]

This Court's decision in *Texas Indus.* is also applicable. There this Court addressed a party's suit brought under the federal antitrust laws, asserting a third-party action for

11. Petitioner's and the Government's reliance on *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) is misplaced. There, unlike here, the United States was a party. The Government sued a bank seeking recovery on a check it issued that the bank paid on a forged indorsement. *Id.* at 365-66. The act of issuing the check, unlike the reimbursement claim raised here, directly arose from federal law. *Id.* at 365. In contrast, the reimbursement claim here arose only after Respondent achieved a tort recovery in state court and then only from Blue Cross's Statement of Benefits document. Also, in *Clearfield*, unlike here, there were "[v]arious treasury regulations govern[ing] the payment and endorsement of government checks". *Id.* at 367 fn2.

contribution against respondents if petitioner was found liable. The Court concluded that federal courts lacked jurisdiction to hear petitioner's contribution claim because, based on its review of the language of the Sherman and Clayton Acts, Congress did not address or otherwise imply that a right to contribution exists under those statutes. *Id.* 451 U.S. at 639-40. Despite the existence of a federal interest – in that a contribution claim would supplement federal enforcement and fulfill the objects of the statutory scheme – and despite Congress "expect[ing] the courts to give shape to the statute's broad mandate by drawing on common-law tradition", this Court held that creating federal common law was not appropriate because there was never a mention of the contribution issue during the statutes' "90 years" of existence, during which numerous amendments occurred. *Id.* at 642-45. The same reasoning equally applies here. FEHBA and its legislative history omit any mention of reimbursement issues, even after numerous amendments since the statute was enacted in 1959.

Finally, even if a federal interest exists here, "uniformity" would not be lost by allowing state courts to decide the reimbursement question. "[T]he route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions." *Pan American Petroleum*, 366 U.S. at 665 (*citing*, *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922). "If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured." *Id.*

2. *No Significant Actual State Law Conflict Exists*

"[W]hen courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997). As explained herein, "[w]hat is fatal to [Blue

Cross's] position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994).

II. PETITIONER'S AND THE GOVERNMENT'S ALTERNATIVE ARGUMENT FOR FEDERAL JURISDICTION IS UNAVAILING

Conscious of the difficulty to show that FEHBA provides federal question jurisdiction over the parties' dispute, Petitioner and the Government rely on a narrow body of caselaw allowing federal jurisdiction where, despite the absence of a federal cause of action, the claim turns substantially on questions of federal law. (Govt. Br. 25-29; Pet. Br. 41 fn5). As this Court has instructed, however, this doctrine applies only in narrow, limited situations. *See, Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, – U.S. –, 125 S. Ct. 2363 (June 13, 2005).

Petitioner and the Government heavily rely on this Court's *Grable* decision, which involved a former landowner suing in state court to quiet title against a tax sale purchaser, alleging that the Internal Revenue Service had given him inadequate notice of sale. *Id.* at 2366. Significantly, the *Grable* Court rejected previous loose interpretations of this doctrine that suggested an "expansive view that mere need to apply federal law in a state-law claim will suffice to open the 'arising under' door." *Id.* at 2367 (referring to interpretations under *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), relied on by the Government here). The Court confirmed instead "that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Id.* Further, even if established, the Court instructed that "the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional

judgment about the sound division of labor between state and federal courts governing the application of §1331." *Id.*

In *Grable*, unlike here, the plaintiff premised its superior title claim solely on interpretation of federal law, the federal tax statute. *Id.* at 2368 ("Whether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute"). Here, Petitioner and the Government do not rely on FEHBA, its legislative history or its contract. Rather, they solely rely on the Statement of Benefits that Blue Cross authored and issued to insureds. More importantly, Blue Cross does not, nor can it, argue that the reimbursement provision in that document needs interpretation or is in dispute. There simply is no existence of, or need to interpret, a substantial federal law in this case. This case is therefore weaker than the issue this Court held was outside of federal jurisdiction in *Merrell Dow*. *See*, *Grable*, 125 S.Ct. at 2369 (*citing*, *Merrell Dow*, 478 U.S. at 806 (rejecting federal jurisdiction even though "federal law would have to be applied to resolve the claim")).[12]

At bottom, *Grable* is a rule for hard cases, that allows the Court the flexibility to recognize federal jurisdiction in unusual situations which present a supervening need for federal jurisdiction over a state-created cause of action. The rarity with which those cases arise is evidenced by the fact that this Court has rarely exercised such power. The record in this case clearly does not fit within this extraordinary exception.

12. The lack of any Congressional indication of concern over reimbursement issues in FEHBA, and the burdensome effect it would have on federal courts to hear matters that state courts are cable of hearing, also strongly weigh against applying this doctrine. *See*, *Grable*, 125 S.Ct. at 2370-71.

CONCLUSION

Wherefore, amicus curiae, in support of Respondent, respectfully request that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
MICHAEL R. KARNUTH
KRISLOV & ASSOCIATES, LTD.
20 NORTH WACKER DRIVE
SUITE 1350
CHICAGO, ILLINOIS 60606
(312) 606-0500

Attorneys for Amicus Curiae